IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

ROBERT G. WING, Receiver for 4NExchange, L.L.C., **Plaintiff,** **vs.** **GARTH T. HARRISON and CARMEN K. HARRISON as Trustees of the GARTH T. HARRISON and CARMEN K. HARRISON TRUST,** **Defendants.**	**MEMORANDUM DECISION AND ORDER** **Case No. 2:03CV26DAK**

Defendants Garth T. Harrison and Carmen K. Harrison as trustees of the Garth T. Harrison and Carmen K. Harrison Trust (collectively the "Harrisons") move for summary judgment, arguing that the money they received from Lonnie Braithwaite was not a fraudulent transfer. In response, Plaintiff Robert G. Wing, Receiver for 4NExchange, L.L.C., ("Receiver") moves this court for summary judgment against the Harrisons, arguing that the money the Harrisons received from Braithwaite was a fraudulent transfer under Utah Code Ann. § 25-6-5(1) and seeks a return of the amount paid. The court held a hearing on the motions on April 27, 2004. Plaintiff Robert G. Wing ("Receiver") was represented by David Eckersley, and Defendants Garth T. and Carmen K. Harrison ("the Harrisons") were represented by Mark J. Griffin. Before the hearing, the court considered carefully the memoranda and other materials submitted by the parties. Since taking the motion under advisement, the court has further

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considered the law and facts relating to the motion. Now being fully advised, the court renders the following Order.

BACKGROUND

In June 1998, the Harrisons invested $239,236.04 with Lonnie Braithwaite and his company Premier Home Builders, which money was supposed to be used to build houses. Braithwaite and Premier agreed that the Harrisons would receive half of the profits of the home building venture and periodic profit and interest payments on their investment. Premier paid the Harrisons $29,000 in profit and interest from their investment. By January 2001, the Harrisons demanded the return of the entire remaining amount of their investment including interest.

Braithwaite and his company Premier performed work on Paul Grant's home, for which he claims he was entitled to $362,313,15 for supervision work. Grant is a director of 4NExchange, a Ponzi scheme that is under investigation by the Securities and Exchange Commission. Braithwaite and Premier also invested in 4NExchange. 4NExchange accounted for Braithwaite and Premier as the same entity. Melissa Gehring, who identified and accounted for investor funds for 4NExchange, accounted for all investments and withdrawals for Premier and Braithwaite under Braithwaite's name. It is also clear from Braithwaite's personal financial records that he and Premier are one entity. Braithwaite's bank account is in the name of Lonnie Braithwaite dba Premier Home Builders, and his personal tax return accounts for investment gains from 4NExchange even though he did not personally invest in 4NExchange. Moreover, Premier is an expired corporation as of July 11, 2001. The contracts at issue in this case also were entered into by Braithwaite. Although they reference Premier as Braithwaite's business,

there is no distinction drawn in any of the contracts that would demonstrate that Braithwaite and Premier are separate entities with separate duties or responsibilities. In fact, in the letter memorializing the agreement between Braithwaite and Grant, it states that Grant is to pay Braithwaite, not Premier. Therefore, a distinction between Braithwaite and Premier does not appear to exist.

From December 14, 1999 through December 18, 2001, Premier Home Builders invested $100,000 in 4NExchange. Braithwaite did not invest anything personally. Through February 27, 2002, Braithwaite and Premier received withdrawals from 4NExchange totaling $497,796. Braithwaite also received other consideration from Grant totaling $46,328: a Breitling Watch worth $14,000; a Yamaha piano worth $6,500; a .50 caliber target rifle worth $7828; a female German Shepard worth $15,000; and a Polaris worth $3,000.

Braithwaite informed Grant about the debt he had with the Harrisons and told him that he wanted Grant to provide him with a check to pay the Harrisons. Braithwaite requested that Grant make out a cashier's check in the name of the Harrisons. On January 28, 2002, Grant purchased a cashier's check from America First Credit Union in the amount of $279,503.40, made payable directly to the Harrisons. The cashier's check bore no indication of the purchaser of the check, however, the source of the funds was 4NExchange.

Grant presented the cashier's check to Braithwaite. The parties dispute whether this payment represented payment to Braithwaite for his supervision work on Grant's home. The Harrisons argue that the amount was a partial payment for the services, and the Receiver argues that as of the date the cashier's check was purchased, Braithwaite and Premier had received more than their investment and supervision fee.

In any event, Braithwaite then gave the cashier's check to the Harrisons along with a Release and Satisfaction of Promissory Note. The Harrisons believed the cashier's check was from Braithwaite. Braithwaite did not tell the Harrisons how he received the check. After 4NExchange was put in receivership, Grant deeded his home to the Receiver. The receiver later sold the home and the funds from the sale were put in the receivership estate.

The Receiver brought this action to recover the amount of the cashier's check, $279,503.40, from the Harrisons, alleging that the amount was a fraudulent transfer and should be returned to the receivership estate.

II. DISCUSSION

Cross Motions for Summary Judgment

The Receiver requests a return of the funds from the Harrisons on the grounds that the cashier's check was a fraudulent transfer under Utah Code Ann. § 25-6-5(1) and the Harrisons seek a judgment allowing them to keep the funds. The Utah Fraudulent Transfer Act, Utah Code Annotated Section 25-6-5, states that "a transfer made . . . by a debtor is fraudulent as to a creditor . . . if the debtor made the transfer . . . with actual intent to hinder, delay, or defraud any creditor of the debtor; or without receiving a reasonably equivalent value in exchange for the transfer." Utah Code Ann. § 25-6-5(1)(a), (b). Intent may be inferred from the mere fact that a debtor is managing a Ponzi scheme. *In re Independent Clearing House*, 77 B.R. 843, 866 (D. Utah 1987). However, Utah Code Ann. § 25-6-9(1) provides that a transfer is not voidable under § 25-6-5(1)(a) "against a person who took in good faith and for a reasonably equivalent value."

The Harrisons argue that the cashier's check does not represent a fraudulent transfer because reasonable equivalent value was given for the exchange. The Receiver asserts that the

Harrisons did not give reasonable equivalent value to 4NExchange. The Harrisons assert that the cashier's check was partial payment from Grant to Braithwaite for his supervision work and the receivership estate benefitted from the supervision work performed by Braithwaite because the value of that work is included in the money received from the sale of Grant's home. The indirect benefit theory is explained in *Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979 (2d Cir. 1981). The *Rubin* court states that a "debtor may sometimes receive 'fair' consideration even though the consideration given for his property or obligation goes initially to a third person." *Id.* at 991. Furthermore, value is determined at the time the transfer is made. *Cooper v. Ashley*, 914 F>2d 458, 466 (4th Cir. 1990).

It is undisputed that the Harrisons invested money with Braithwaite and none of that money was used on Grant's home. Even though the Harrisons assert that Grant owed Braithwaite, who owed the Harrisons, at the time the cashier's check was issued, Braithwaite and Premier had received more from 4NExchange than they claim they were owed. Premier invested $100,000 in 4NExchange, and Braithwaite invested nothing personally. Premier and Braithwaite received more than $540,000 from 4NExchange. Although Braithwaite claims he was entitled to $362,313.15 in supervision fees, on the date that 4NExchange funds were used to purchase the cashier's check issued to the Harrisons, 4NExchange did not owe Braithwaite anything. There is no support in 4NExchange's financial records for the argument that the cashier's check was partial payment for Braithwaite's supervision work. Therefore, the transfer to the Harrisons was without fair consideration even if Braithwaite is given full credit for the value of his supervision services.

The Harrisons also argue that they were subsequent transferee's who took the money in

good faith for reasonable equivalent value. Utah Code Annotated Section 25-6-9(1) provides that "a transfer . . . is not voidable . . . against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee." Although the cashier's check was made out to the Harrisons, they claim that at least Grant and/or Braithwaite exercised dominion and control over the funds.

The parties rely on bankruptcy cases because the Bankruptcy Code was the model for the provision of Utah's Fraudulent Transfer Act that distinguishes between initial and subsequent transferees. Under those cases, an initial transferee is the first transferee who exercises "dominion and control" over the money rather than someone who is a mere "possessor" or "holder" of the money. *Ogden v. Big Sky Motors, Ltd.*,314 F.3d 1190, 1202 (10th Cir. 2002). Exercising "dominion and control" means the transferee has sufficient control over the funds to "put the money to one's own purposes." *Malloy v. Citizens Bank*, 33 F.3d 42 (10th Cir. 1994).

The Harrisons contend that Grant qualifies as a an initial transferee because he used corporate funds for his personal use and had the right to put the money to his own purposes. The Harrisons also claim that Braithwaite or Premier qualify as initial transferees because Braithwaite directed Grant to have the check made out to the Harrisons when he could have used those funds for himself or put it into his business.

However, under *Rupp v. Markgraf*, 95 F.3d 936 (10th Cir. 1996), the Harrisons were initial transferees, not subsequent transferees. In *Rupp,* Rupp was a bankruptcy trustee for Cowboy Enterprises, Inc, and the Markgrafs were judgment debtors of Davis, a principal shareholder and officer in Cowboy Enterprises. *Id.* at 937, Davis had a cashier's check made payable to the Markgrafs which he purchased using Cowboy Enterprises funds. *Id.* Davis

overnighted the check to Cowboy and had it delivered to his home address. *Id.* Six days later the Davises delivered the check to the Markgrafs in exchange for a satisfaction of judgment and a pickup truck. *Id.* at 937-38.

The Markgrafs argued that the bank and Davis were both initial transferees, but the Tenth Circuit disagreed. The Tenth Circuit explained that the relevant "dominion and control" is over the funds after the disputed transfer, not the dominion and control over the transferor before the transfer is made. *Id.* at 940. The extent of the person's control and the extent to which the person uses this control for his own benefit in causing the transfer are not relevant. *Id.* at 941.

Therefore, in this case, the fact that Grant had the control to issue a check on 4NExchange's account and the fact that Braithwaite had the control to direct Grant to purchase a cashier's check is not the type of "dominion and control" relevant to the determination of whether either party was an initial transferee. The relevant time period is after the check was purchased. In order to be initial transferees, Grant and Braithwaite had to exercise control over the funds after the cashier's check was purchased. The Harrisons argue that Braithwaite and Grant exercised dominion and control over the cashier's check when they had possession of the check because they were each in a position to have the check voided or reissued.

"'In order to be a transferee of the funds, one must (1) actually receive the funds, and (2) have full dominion and control over them for one's own account, as opposed to receiving them in trust or as agent for someone else.'" *Id.* (quoting *Richardson v. FDIC*, 164 Bankr. 117 (Bankr. N.D. Cal. 1994)). The *Rupp* court found that because the cashier's check was made payable directly to the Markgrafs, it was a one-step transaction and could not be deposited into any personal account controlled by Davis. Therefore, the Tenth Circuit found that Davis never

had dominion or control over the funds. *Id.* Once the check was issued to the Markgrafs, Davis could not personally access the funds and was, at most, a mere courier of the cashier's check. *Id.* Therefore, the Tenth Circuit concluded that Markgrafs were initial transferees and Davis was the entity for whose benefit the transaction was made. *Id.* at 940.

In this case, under the reasoning of *Rupp*, once the check was issued to the Harrisons, both Grant and Braithwaite were mere couriers of the check. Although the checks were for the benefit of Grant and Braithwaite, once they were issued, Grant and Braithwaite did not have enough dominion and control over the checks to be considered initial transferees. Grant and Braithwaite could not and did not deposit the check into their own accounts–it was not made out to them. Although the Harrisons argue that Grant and Braithwaite had some ability to cancel or void the check, that would be true for any cashier's check.

The Harrisons rely on language from *Rupp* stating that an initial transferee is "in the best position to monitor fraudulent transfers from the debtor," whereas "subsequent transferees usually do not know where the assets came from." *Id.* at 944. It is undisputed in this case that the Harrisons did not know that the funds came from 4NExchange or Grant. Although this case is factually dissimilar to *Rupp* to the extent that the cashier's check in *Rupp* identified the purchaser, this language from *Rupp* is not the main focus of the analysis. Utah's Fraudulent Transfer Act sets out the means for allocating the loss among innocent victims. The focus of the analysis is whether a party exercised dominion and control over the transferred funds. That analysis demonstrates that the Harrisons were initial transferees.

Because only subsequent transferees are entitled to a good faith defense, the fact that the Harrisons did not know that the money was from 4NExchange is moot. As discussed in *Rupp*,

the legislature has made its own judgment of who should bear the risks of loss under these situations and the courts are bound to accept that judgment. *Id.* at 944. Even if this court were to consider equitable principles, the equities do not favor the Harrisons to such an extent that they would trump the legislative intent set out in Utah's fraudulent transfer act.

The Harrisons main equitable argument focuses on the fact that it had no knowledge of the connection between the cashier's check and 4NExchange. However, both the Harrisons and the 4NExchange investors are innocent victims in this matter. The Harrisons invested with Braithwaite and took a risk just as the investors of 4NExchange took a risk with 4NExchange. Just as the investors of 4NExchange had the opportunity to investigate 4NExchange before investing, the Harrisons had the opportunity to investigate Braithwaite and Premier. Returning the money to the 4NExchange estate does not leave the Harrisons without recourse against Braithwaite and Premier to receive payment. The Release and Satisfaction of Promissory Note is undoubtedly voidable given that it was based on the receipt of a fraudulent transfer. However, the only recourse the 4NExchange investors have to get a return of any kind is for funds that should properly be in the 4NExchange estate to be returned. This court is not convinced that the equities weigh in favor of the Harrisons to an extent that the legislative allocation of risk should be altered. Accordingly, the court concludes that the cashier's check made payable to the Harrisons was a fraudulent transfer and the moneys should and are ordered to be returned to the Receiver for 4Nexchange. Therefore, the Receiver's Motion for Summary Judgment is granted and Defendants' Motion for Summary Judgment is denied.

CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that Plaintiff's motion for summary judgment GRANTED and Defendants' Motion for Summary Judgment is DENIED.

DATED this 29th day of April, 2003.

BY THE COURT:

DALE A. KIMBALL
United States District Judge

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United States District Court
for the
District of Utah
April 30, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:03-cv-00026

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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